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No. 15-537

In the Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND HECTOR MARTINEZ-MALDONADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's acquittal of petitioners on some counts bars the government from retrying petitioners on another count on which the same jury convicted petitioners, when that conviction was subsequently vacated for legal error and the jury's verdict in the first trial was inconsistent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 790 F.3d 41. The memorandum and order of the district court (Pet. App. 41a-53a) is reported at 988 F. Supp. 2d 191. A prior opinion of the court of appeals (Pet. App. 59a-133a) is reported at 722 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2015. A petition for rehearing was denied on July 27, 2015 (Pet. App. 134a-135a). The petition for a writ of certiorari was filed on October 23, 2015, and was granted on March 28, 2016, limited to question 1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of, *inter alia*, federal program bribery, in violation of 18 U.S.C. 666. Petitioners were sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Bravo-Fernandez Judgment 1-3; Martínez-Maldonado Judgment 1-3. As relevant here, the court of appeals vacated petitioners' bribery convictions on grounds of instructional error and remanded for further proceedings. Pet. App. 59a-133a. On remand, before retrial, the district court denied petitioners' motions for acquittals on the bribery charges under the Double Jeopardy Clause. *Id.* at 41a-53a. The court of appeals affirmed. *Id.* at 1a-40a.

1. From January 2005 until early 2011, petitioner Hector Martínez-Maldonado was a senator for the Commonwealth of Puerto Rico. Pet. App. 61a. Petitioner Juan Bravo-Fernandez was the president of Ranger American, a private security firm in Puerto Rico that provided services such as armored car transportation and security guard staffing. *Ibid.* During the time relevant to this case, Martínez-Maldonado was chairman of the Senate's Public Safety Committee, which had jurisdiction over bills related to the security industry in Puerto Rico. *Id.* at 61a-62a.

In early 2005, Bravo-Fernandez began advocating for legislation that, if enacted, would "provide[] substantial financial benefits" to him. Pet. App. 61a. On

February 23, 2005, he presented a proposed bill, which became Senate Project 410 (SP 410) to Martínez-Maldonado. 2/17/11 Tr. 125, 129-130, 133-145. In early March 2005, Bravo-Fernandez provided a proposed bill that became Senate Project 471 (SP 471) to Martínez-Maldonado. *Id.* at 134-135; Pet. App. 61a. Bravo-Fernandez and Martínez-Maldonado were not friends and had no relationship before Bravo-Fernandez's advocacy for the two bills. 2/23/11 Tr. 80-81; 2/22/11 Tr. 32-33; 2/17/11 Tr. 158-159.

In his role as chairman of the Senate's Public Safety Committee, Martínez-Maldonado "was in a position to exercise a measure of control over the introduction and progression of the bills through the Committee and the Senate." Pet. App. 61a-62a. Another senator, Jorge de Castro Font, was chairman of the Senate's Rules and Calendars Committee, which exercised control over which bills were brought to a vote and when. See *id.* at 63a.

On March 2, 2005, Bravo-Fernandez purchased several tickets for $1000 each to attend a professional boxing match between the popular Puerto Rican boxer Félix "Tito" Trinidad and Ronald Lamont "Winky" Wright, which was scheduled to occur in Las Vegas in May 2005. Pet. App. 62a. Bravo-Fernandez's telephone records from that day reflect that he made multiple calls to de Castro Font and Martínez-Maldonado shortly after he purchased the tickets to the boxing match. 2/23/11 Tr. 102-106; see GX-38; GX-84; GX-87. That same day, Martínez-Maldonado submitted SP 410 for consideration by the Senate. Pet. App. 61a-62a.[1]

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[1] Petitioners state (Br. 5) that "[t]he jury heard evidence that Bravo had invited Martínez [to the boxing match] only as a last-minute replacement" for a friend. But the witness who provided

Later in March 2005, Bravo-Fernandez met with Martínez-Maldonado and an aide to discuss the status of SP 471. 2/17/11 Tr. 150-151. The aide testified that Bravo-Fernandez and Martínez-Maldonado also discussed the trip to Las Vegas to watch the boxing match. *Id.* at 150-153. After Bravo-Fernandez left the office, the aide testified that he told Martínez-Maldonado that it would be improper to accept the trip because Bravo-Fernandez was asking Martínez-Maldonado to pass legislation. *Id.* at 153.

On April 20, 2005, Martínez-Maldonado presided over a Public Safety Committee hearing on SP 471, at which Bravo-Fernandez testified. Pet. App. 62a. The next day, Bravo-Fernandez reserved a hotel room at the Mandalay Bay Hotel in Las Vegas. *Ibid.* Bravo-Fernandez also arranged first-class airline tickets for himself, Martínez-Maldonado, and de Castro Font from Puerto Rico to Las Vegas. *Ibid.* On May 11, 2005, Martínez-Maldonado issued a Committee report in support of SP 471. *Ibid.*

On May 13, 2005, Bravo-Fernandez, Martínez-Maldonado, and de Castro Font flew to Las Vegas and checked into the Mandalay Bay Hotel, where they stayed for two nights in separate rooms. See Pet. App. 62a. Bravo-Fernandez paid for Martínez-Maldonado's room the first night. *Ibid.*[2] The three

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that testimony had earlier testified before the grand jury that Bravo-Fernandez told him he was traveling to Las Vegas with "a political group," mentioning "a couple of Senators." 2/23/11 Tr. 162. The grand jury testimony was admitted at trial as prior inconsistent statements of a declarant under Federal Rule of Evidence 801(d)(1)(A). 2/23/11 Tr. 155-164.

[2] Although de Castro Font paid for Martínez-Maldonado's hotel room the second night, the evidence at trial established that Bravo-Fernandez had been giving cash bribes to de Castro Font

men went out to dinner the first night, with Bravo-Fernandez paying the $495 bill. *Ibid.* The second night, they attended the boxing match, sitting in the $1000 seats purchased by Bravo-Fernandez. *Ibid.*

On May 15, 2005, the three men flew from Las Vegas to Miami, where they stayed at the Marriott South Beach in individual rooms that Bravo-Fernandez paid for, at a total cost of $954.75. Pet. App. 63a. On May 16, 2005, they returned to Puerto Rico. *Ibid.*

On May 17, 2005, de Castro Font scheduled an immediate Senate floor vote on SP 471. Pet. App. 63a. Martínez-Maldonado and de Castro Font both voted in favor of the bill. *Ibid.* The next day, Martínez-Maldonado issued a Committee report supporting SP 410. *Ibid.* On May 23, 2005, de Castro Font scheduled an immediate floor vote on SP 410. *Ibid.* Again, Martínez-Maldonado and de Castro Font voted in favor of the bill. *Ibid.*

2. On June 22, 2010, a federal grand jury in the District of Puerto Rico returned an indictment charging petitioners with federal program bribery, in violation of 18 U.S.C. 666; conspiracy, in violation of 18 U.S.C. 371; and interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3)(A) (Travel Act). J.A. 26-52. Martínez-Maldonado was additionally charged with obstruction of justice, in violation of 18 U.S.C. 1512 (2000 & Supp. V 2005). J.A. 26.

Following a jury trial, petitioners were convicted of federal program bribery, in violation of 18 U.S.C. 666. J.A. 89; Pet. App. 4a. The jury acquitted petitioners of conspiring to violate Section 666 and of violating the

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for many years. 2/17/11 Tr. 25-31. In 2009, de Castro Font pleaded guilty to multiple counts of corruption by an elected official and was sentenced to 60 months of imprisonment. Pet. App. 62a n.2.

Travel Act in furtherance of violating Section 666. J.A. 86-88; Pet. App. 4a.[3] The district court sentenced each petitioner to 48 months of imprisonment. Pet. App. 64a.

3. The court of appeals vacated petitioners' federal program bribery convictions, holding that the jury instructions had erroneously permitted the jury to find petitioners "guilty of offering and receiving a gratuity, rather than a bribe." Pet. App. 81a; see *id.* at 105a. As a matter of first impression, and "[u]nlike most circuits to have addressed th[e] issue," the court held that Section 666 criminalizes only quid pro quo bribes, and not gratuities. *Id.* at 60a.

The court of appeals recognized that "significant portions" of the jury instructions and the government's closing argument "were consistent with a bribery theory under [Section] 666," Pet. App. 89a, including Jury Instruction 22, titled "Bribery," which stated that "[b]ribery requires that the government prove beyond

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[3] Bravo-Fernandez was additionally convicted of conspiracy to travel in interstate commerce in aid of racketeering and violating the Travel Act with the intent to promote bribery in violation of Puerto Rico law. J.A. 86-88; see Pet. App. 4a. Martínez-Maldonado was additionally convicted of conspiracy, but the jury "checked 'No' as to each potential object of the conspiracy." Pet. App. 64a; see J.A. 87-88. Following the verdict, the district court granted Bravo-Fernandez's motion for a judgment of acquittal on the Travel Act count because the Puerto Rico bribery statutes that provided the predicate for the violation were repealed before the travel took place. Pet. App. 64a. The court also initially dismissed Martínez-Maldonado's conspiracy conviction in light of the jury's failure to specify an object of the conspiracy, but the court then reinstated the conviction and later declared a mistrial and dismissed the count without prejudice. *Ibid.*

a reasonable doubt the existence of a *quid pro quo* or, in plain English, an agreement that the thing of value that is given to the public official is in exchange for that public official promising to perform official acts for the giver," *id.* at 85a. But the court observed that other language in the jury instructions involving Section 666 stated that the government did not need to prove that an agreement to offer or accept a thing of value was made before the recipient took official action, and thus permitted a finding of guilt based on a reward for a completed act. *Id.* at 82a-90a.

The court of appeals noted that the evidence at trial supported a finding of guilt on both an exchange theory and a gratuity theory. Pet. App. 90a; see *id.* at 5a. Because the court could not say with certainty that the jury did not rely on a gratuity theory, it vacated petitioners' Section 666 convictions and remanded for further proceedings. *Id.* at 104a-105a, 130a.[4]

4. The case returned to the district court for a possible retrial of petitioners on the federal program bribery charges. See Pet. App. 2a (observing that the court of appeals had "remanded for a possible new

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[4] The court of appeals also reversed Bravo-Fernandez's conspiracy conviction, holding that he could not be found guilty of conspiring to travel in interstate commerce to further a violation of Puerto Rico bribery laws because those laws had been repealed before the travel occurred. Pet. App. 108a-120a. In addition, the court reversed the district court's declaration of a mistrial and dismissal of Martínez-Maldonado's conspiracy charge without prejudice, concluding that the district court's initial dismissal of that charge constituted an acquittal, whether "[r]ight[] or wrong[]." *Id.* at 127a. The court of appeals' rulings on the conspiracy convictions are not at issue here.

trial based on a proper theory of liability under [Section] 666").

Before retrial, petitioners moved for judgments of acquittal on the Section 666 offenses under the Double Jeopardy Clause. Pet. App. 41a-42a. Petitioners argued that collateral estoppel precluded retrial on those charges because, in petitioners' view, the jury had necessarily found that they were not guilty of violating Section 666 when it acquitted them of conspiring and traveling with the intent to violate Section 666. *Ibid.*

The district court denied the motions. Pet. App. 41a-53a. The court rejected petitioners' argument that the jury's verdict on the conspiracy and Travel Act charges demonstrated that the jurors had necessarily decided that petitioners did not commit bribery, given that the jury had also convicted petitioners of a standalone bribery offense, and thus "necessarily * * * found all elements of section 666 federal program bribery to be proven beyond a reasonable doubt." *Id.* at 44a. Although those convictions had been vacated for instructional error, the court concluded that they remained a relevant part of the record when "determin[ing] what the jury necessarily decided" for purposes of applying collateral estoppel. *Id.* at 44a n.2.

Considering the convictions and acquittals together, the district court was "not persuaded that it c[ould] glean the underlying facts and theory" that led to the acquittals on the conspiracy and Travel Act counts. Pet. App. 47a. The court explained that "[t]he fact that the jury unanimously found that all elements of the substantive section 666 charge were met when they convicted" on the bribery counts "would seem to

suggest * * * that at least one other element of" the conspiracy and Travel Act charges "was not satisfied." *Id.* at 48a (emphasis omitted). Petitioners' argument "that a rational jury *could not* have found the absence of an agreement, an overt act, or interstate travel" demonstrated only "that the jury acted irrationally and the verdict simply was inconsistent." *Ibid.* Petitioners, the court concluded, therefore could not meet their burden of showing that the "jury necessarily decided the issue of bribery in [their] favor." *Id.* at 53a.[5]

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[5] The district court alternatively held that the verdicts on the conspiracy and Travel Act counts did not actually constitute acquittals, but rather indicated only that the jury had not unanimously agreed that Section 666 was a predicate for those crimes. Pet. App. 46a-47a. The court based that determination on the special verdict form, which listed multiple objects of the conspiracy and predicates for the Travel Act counts and directed the jury to check all that they "unanimously f[ound] to apply" if they concluded that petitioners were guilty. J.A. 86-88. The court reasoned that, although the verdict on those counts demonstrated that "the jury *did not unanimously find* section 666 bribery" to be a predicate for the conspiracy and Travel Act charges, "[t]hat is not equivalent to stating that the jury *unanimously found* that section 666 bribery was *not* the object of the conspiracy or predicate of the travel." Pet. App. 46a-47a. The court concluded that "the jury's check marks could represent hung counts—not acquittals." *Id.* at 47a. Accordingly, the court could not "accept [petitioners'] argument that when the jury checked 'no' as to the federal program bribery predicates for liability [on the conspiracy and Travel Act charges], that was a unanimous acquittal that may be interpreted as such in a double jeopardy issue preclusion analysis." *Id.* at 46a (citation and internal quotation marks omitted). Neither party briefed that issue on appeal and the court of appeals did not address that aspect of the district court's decision.

5. The court of appeals affirmed, holding that the collateral estoppel component of the Double Jeopardy Clause did not bar the government from retrying petitioners on the Section 666 counts. Pet. App. 1a-40a.

Under this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the court of appeals observed, a defendant who can show that the jury necessarily decided an issue in his favor in a prior prosecution that ended in an acquittal may preclude relitigation of that issue in a subsequent prosecution. Pet. App. 8a, 24a. To determine whether a defendant has carried that burden, *Ashe* directed that courts must examine all relevant record material and assess whether "a 'rational jury,' as a practical matter, decided adversely to the government an issue to be relitigated in the new prosecution." *Id.* at 8a (quoting *Ashe*, 397 U.S. at 444).

The court of appeals recognized that this Court adopted "an important limitation" on preclusion principles in *United States* v. *Powell*, 469 U.S. 57 (1984), which held that collateral estoppel is inapplicable when the jury acts irrationally by returning inconsistent verdicts. Pet. App. 10a. In that situation, "*Powell* concluded[] [that] there is no way to know without speculating which of the inconsistent verdicts—the acquittal or the conviction—the jury really meant," and so collateral estoppel principles "are impossible to apply." *Id.* at 11a (citation and internal quotation marks omitted). The court of appeals noted that, "in light of *Powell*," petitioners did "not deny that a true inconsistency in what the jury has done in acquitting on one offense while convicting on another can make unanswerable *Ashe*'s question about what the jury necessarily decided in rendering the acquittal." *Ibid.*

Applying *Ashe* and *Powell*, the court of appeals concluded that collateral estoppel did not apply because the jury verdicts in petitioners' trial were truly inconsistent. The court observed that "the jury was offered the same theories of [Section] 666 liability as to every count involving [Section] 666, whether as a predicate offense or a standalone crime." Pet. App. 24a. Because the jury had found petitioners guilty of violating Section 666 but not guilty of conspiracy and traveling with the intent to violate Section 666, the court could not "reconcile[] the verdicts." *Ibid.* That inconsistency, the court held, made it impossible to determine that the jury had necessarily decided that petitioners did not commit bribery in violation of Section 666. *Id.* at 15a-36a.[6]

The court of appeals rejected petitioners' argument that the Section 666 convictions could not be considered in determining what the jury decided because those convictions had been vacated for legal error. Pet. App. 15a-20a. *Ashe*, the court observed, "instructed that, for purposes of determining the collateral estoppel effect of acquittals, [courts] must undertake a 'practical' analysis based on the 'record' of the prior proceeding, and with 'an eye to all the circumstances of the proceedings.'" *Id.* at 16a (quoting *Ashe*, 397 U.S. at 444) (citation and internal quotation marks

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[6] Petitioners argued below that the verdicts could be harmonized if the court of appeals concluded that the acquittals represented a rejection of the exchange theory of liability while the convictions represented acceptance of a gratuity theory of liability. The court rejected that argument because the jury had been instructed on a gratuity theory for all the relevant counts and so could not have rationally convicted on some and acquitted on others. See Pet. App. 20a-36a. In this Court, petitioners have abandoned any claim that the verdicts can be reconciled.

omitted). The court reasoned that "[l]ike the acquittals on which [petitioners] rely, the convictions in this case are part of what the jury decided at trial." *Ibid.* "Thus, for purposes of deciding whether the jury necessarily decided that the government failed to prove that [petitioners] violated [Section] 666," the court observed, "the fact [that] the jury also convicted [petitioners] of violating [Section] 666 would seem to be of quite obvious relevance, even though the convictions were later vacated." *Id.* at 17a.

The court of appeals also rejected petitioners' effort to analogize vacated convictions to counts on which a jury has hung, which are not a relevant part of the record for purposes of applying collateral estoppel under *Yeager* v. *United States*, 557 U.S. 110 (2009). Pet. App. 17a. Hung counts cannot "create a 'truly inconsistent' verdict," the court observed, because, as *Yeager* emphasized, they do not constitute jury decisions at all. *Id.* at 18a (citing *Yeager*, 557 U.S. at 121-122). Under that "line of reasoning in *Yeager*," the court of appeals concluded that "vacated counts should be treated differently from hung counts" because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Ibid.* When such a conviction creates a true inconsistency, the court explained, "*Powell*'s 'prudent acknowledgment' that inconsistent verdicts make it impossible to determine what a jury necessarily decided * * * is not undermined by the mere fact" that the conviction has been vacated. *Ibid.* (quoting *Powell*, 469 U.S. at 65). The court therefore "conclude[d] that vacated convictions, unlike hung counts, are relevant to the *Ashe* inquiry into what a jury necessarily decid-

ed when acquitting on counts related to the vacated convictions." *Id.* at 19a.[7]

SUMMARY OF ARGUMENT

The collateral estoppel component of the Double Jeopardy Clause does not bar a retrial of petitioners on the Section 666 offenses. The jury in the first trial returned irreconcilably inconsistent verdicts, convicting petitioners of violating Section 666 but acquitting them of conspiring and traveling with the intent to violate Section 666. In light of that inconsistency, petitioners have not carried their burden of showing that the jury necessarily decided that they were not guilty of violating Section 666.

A. A defendant seeking to preclude relitigation of an issue under the Double Jeopardy Clause bears the burden of demonstrating, based on a practical and realistic review of the entire record, that the jury in the prior trial necessarily decided the issue in his favor when it acquitted him. In *United States* v. *Powell*, 469 U.S. 57 (1984), this Court held that a defendant cannot satisfy that burden when the jury returns

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[7] The court of appeals also rejected petitioners' separate double jeopardy claim premised on a transcription error in a district court line order, which purported to memorialize the judgments in the first appeal but erroneously stated that petitioners had been acquitted. Pet. App. 37a-39a. The court of appeals concluded that the line order did "not amount to a substantive acquittal by the District Court" because it was "merely intended as a ministerial act to carry out [the court of appeals'] instructions—whatever they may have been—and not an application of law to fact regarding [petitioners'] 'lack of criminal culpability.'" *Id.* at 38a (quoting *Evans* v. *Michigan*, 133 S. Ct. 1069, 1077 (2013)). Petitioners sought to challenge that ruling in this Court, but the Court declined to grant a writ of certiorari on the issue. 136 S. Ct. 1491 (2016).

inconsistent verdicts. In that situation, a defendant cannot show that the acquittal reflects the jury's conclusion that the government had not proved its case. *Powell* accordingly held, in accordance with general preclusion principles, that collateral estoppel does not apply.

In this case, the jury returned irreconcilably inconsistent verdicts by convicting petitioners of violating Section 666 but acquitting them of offenses involving Section 666 as a predicate. Because the district court instructed on the same theories of liability for all counts involving Section 666, no rational jury could have reached those contradictory results. The inconsistent verdicts make it impossible to know what the jury necessarily decided in its acquittals. Petitioners therefore have not met their burden of showing the most essential prerequisite for applying collateral estoppel: that the jury actually resolved facts in their favor.

B. Petitioners cannot avoid that conclusion by noting that their convictions for violating Section 666 were subsequently vacated for instructional error. That error—which applied equally to all of the Section 666 offenses—does not resolve the inconsistency in the verdicts and so cannot provide a basis for viewing the acquittals as reflecting the jury's factual conclusion that petitioners were not guilty of violating Section 666.

1. Petitioners err in relying on *Yeager* v. *United States*, 557 U.S. 110 (2009). That case did not hold, as petitioners assert (Br. 12), "that an acquittal retains its preclusive effect despite any inconsistency with a hung count." Rather, *Yeager* held that a hung count *cannot* be inconsistent with an acquittal because it

does not represent a jury determination at all. *Yeager* emphasized that "a jury speaks only through its verdict" because those are the only decisions that represent the unanimous agreement and collective judgment of all 12 members of the venire. 557 U.S. at 121. A hung count, in contrast, cannot be "evidence of [the jury's] irrationality" because the jury as a whole has failed to agree. *Id.* at 125. Thus, as *Yeager* itself emphasized, a mix of acquittals and hung counts presents "an entirely different context" than "inconsistent *verdicts*." *Id.* at 124. *Yeager* accordingly has no application here, where the jury as a whole acted irrationally by returning irreconcilably inconsistent verdicts.

Petitioners further misread *Yeager* in suggesting that it adopted a rule that events that do not terminate jeopardy must be disregarded when conducting a collateral estoppel inquiry. Logically, many events at trial may fail to terminate jeopardy, yet will inform an inquiry into what the jury necessarily decided for purposes of applying collateral estoppel. By treating those two separate double jeopardy questions as intrinsically linked, petitioners urge a line of reasoning that *Yeager* itself expressly rejected.

2. Principles of finality and respect for the jury's verdict do not support petitioners' suggestion that courts must disregard a jury's inconsistency when applying collateral estoppel. Petitioners base that suggestion on *Powell*, but misunderstand its whole point. *Powell* refused to set aside a conviction that was inconsistent with an acquittal—and so preserved the finality of both verdicts—precisely because in that situation it is impossible to know that the jury necessarily resolved the facts in the defendant's favor, and it is thus unreasonable to treat the acquittal as the

verdict the jury "really meant." 469 U.S. at 68. That rationale does not lose its force when a conviction is vacated for legal error because vacatur does not erase the jury's inconsistency, alter what the jury necessarily decided, or excuse a defendant's inability to answer that question. If a defendant cannot satisfy his burden of showing that the jury decided facts in his favor at the conclusion of the initial trial, as *Powell* held, then he remains unable to show that the jury decided facts in his favor for purposes of applying collateral estoppel in a second trial.

3. Petitioners are also wrong to suggest that this Court has approved a categorical rule that vacated convictions may not be used against a defendant for any purpose. To the contrary, this Court has recognized in a different case involving the Double Jeopardy Clause that an invalid conviction may—despite its unconstitutionality for other purposes—be relied upon to determine what the jury that returned that conviction necessarily decided. See *Morris* v. *Mathews*, 475 U.S. 237 (1986). Lower courts, too, have held in a variety of contexts that vacated convictions may reveal what the jury necessarily determined in its other verdicts or provide other relevant and admissible evidence in subsequent proceedings. Contrary to petitioners' suggestion, the court of appeals' decision below fits comfortably with precedent.

C. Policy arguments do not support petitioners' contention that courts should ignore a jury's inconsistency when applying collateral estoppel. Petitioners maintain that without the availability of collateral estoppel in this context prosecutors would be encouraged to overcharge cases and press unreasonable interpretations of criminal statutes. But petitioners of-

fer no evidence that prosecutors strategically overcharge and adopt indefensible interpretations of statutes in hopes of obtaining an inconsistent verdict so as to defeat the application of collateral estoppel in any ensuing retrial. And such speculative policy arguments—which rest on a highly attenuated causal chain—cannot excuse petitioners' inability to show that the jury necessarily found facts in their favor.

Petitioners' policy arguments also ignore the significant interests in permitting retrial when a conviction is vacated for legal error. Those interests deserve respect here, where the evidence supported a bribery conviction on a proper theory, the jury was instructed on that theory, the jury returned a conviction for bribery, and petitioners have not shown that the jury necessarily found that they did not commit bribery.

ARGUMENT

COLLATERAL ESTOPPEL DOES NOT APPLY BECAUSE THE INCONSISTENT VERDICTS PREVENT PETITIONERS FROM SATISFYING THEIR BURDEN OF SHOWING THAT THE JURY NECESSARILY DECIDED THAT THEY WERE NOT GUILTY OF VIOLATING SECTION 666

Petitioners cannot carry their burden of showing that the jury in their first trial necessarily determined that they were not guilty of bribery in violation of Section 666. The jury returned inconsistent verdicts, making it impossible to determine that the jury resolved that issue in petitioners' favor. Nor does it matter that the convictions were subsequently vacated for unrelated legal error. Vacatur of the convictions does not erase the historical fact of the jury's inconsistency and does nothing to establish that the jury that convicted petitioners of violating Section 666

necessarily found that they were not guilty of that offense. The court of appeals thus correctly held that collateral estoppel does not apply.

A. The Inconsistent Verdicts In Petitioners' First Trial Prevent Them From Showing That The Jury Necessarily Decided That They Did Not Commit Bribery

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court interpreted the Clause to incorporate the principle of collateral estoppel, which "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; see *id.* at 445.

To establish that the collateral estoppel component of the Double Jeopardy Clause applies, "[t]he burden is 'on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.'" *Schiro* v. *Farley*, 510 U.S. 222, 233 (1994) (quoting *Dowling* v. *United States*, 493 U.S. 342, 350 (1990)); see *id.* at 232, 236 (rejecting defendant's reliance on collateral estoppel because he had "not met his burden of establishing the factual predicate for the application of the doctrine" by showing that the issue of intent to kill "was actually and necessarily decided in [his] favor"). If multiple "possible explanations for the jury's acquittal verdict at [the] first trial" exist, a defendant cannot satisfy that burden because he cannot show that any particular issue "was determined in [his] favor." *Dowling*, 493 U.S. at 352.

To determine what a jury in a prior trial has necessarily decided, this Court's "cases require an examination of the entire record," *Schiro*, 510 U.S. at 236, "taking into account the pleadings, evidence, charge, and other relevant matter," *Ashe*, 397 U.S. at 444. The Court has explained that "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ibid.* (quoting *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948)). "[T]he rule of collateral estoppel in criminal cases," the Court has emphasized, must be applied with "realism and rationality." *Ibid.*

The Court has further clarified that "[t]o identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." *Yeager* v. *United States*, 557 U.S. 110, 122 (2009). Thus, *Yeager* held that "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding.'" *Id.* at 121 (second set of brackets in original) (quoting *Ashe*, 397 U.S. at 444). "Because a jury speaks only through its verdict," the Court reasoned, "its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Ibid.*

In contrast, courts have held that convictions from the same jury are relevant under *Ashe* because they may reveal that the jury either did or did not resolve a particular issue in the defendant's favor when acquitting on a related count. In *Schiro*, for example, this Court considered whether the defendant's conviction for felony murder reflected a jury finding that he did not have an intent to kill, and ultimately concluded that the verdict "did not necessarily depend on a finding" of lack of intent. 510 U.S. at 235; see, *e.g.*, *Flittie*

v. *Solem*, 775 F.2d 933, 941-942 (8th Cir. 1985) (rejecting argument that prior acquittal on murder charge necessarily decided that defendant was not an after-the-fact participant so as to preclude a subsequent prosecution on an accessory charge because the same jury had convicted the defendant of conspiracy based on his post-murder conduct), cert. denied, 475 U.S. 1025 (1986); *United States* v. *Neal*, 822 F.2d 1502, 1507-1508 (10th Cir. 1987) (holding that jury did not necessarily decide that the defendant had not paid kickbacks when acquitting him on one count of mail fraud so as to preclude a subsequent prosecution for perjury because the same jury had convicted him on other counts involving payment of kickbacks).

2. a. As the court below recognized, this Court's precedents establish "an important limitation on the application of the rule of collateral estoppel" when a jury has reached inconsistent verdicts in the prior proceeding. Pet. App. 10a. When an acquittal is inconsistent with a conviction on a related count—such as when a jury acquits on a predicate offense but convicts on a compound offense—the Court has observed that it is impossible to determine what the jury necessarily decided in acquitting, making "principles of collateral estoppel * * * no longer useful." *United States* v. *Powell*, 469 U.S. 57, 68 (1984).

As *Powell* explained, "[i]nconsistent verdicts * * * present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." 469 U.S. at 65. A defendant cannot establish that "the acquittal on the predicate offense was proper—the one the jury 'really meant,'" because "[i]t is equally possible that the jury, convinced of guilt,

properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* at 65, 68. The Court has accordingly declined to treat the acquittal as "show[ing] that [jurors] were not convinced of the defendant's guilt.'" *Id.* at 63 (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)). The "inconsistency is reason, in itself, for not giving preclusive effect to the acquittal[]" in a subsequent prosecution. *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980).

Indeed, to the extent that any meaning can be attributed to an acquittal that is inconsistent with a conviction, this Court has recognized that the most likely explanation is that the jury believed the defendant was guilty of both counts but should only be punished for one crime. *Powell*, 469 U.S. at 65 ("[S]uch inconsistencies often are a product of jury lenity."); see *United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, J.) (recognizing that "in a criminal case the jury has the power to bring in a verdict in the teeth of both law and facts" and may return inconsistent verdicts because it believed that by doing so it would "prevent the punishment from getting too far out of line with the crime") (citation and internal quotation marks omitted). The Court accordingly "interpret[s] the acquittal as no more than [the jurors'] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." *Dunn*, 284 U.S. at 393 (citation omitted). The possibility that the jury "acquit[ted] out of compassion" fortifies the conclusion that the inconsistent verdicts did not necessarily resolve facts in the defendant's favor. *Standefer*, 447 U.S. at 22.

b. This Court's recognition that inconsistent verdicts cannot trigger collateral estoppel accords with general preclusion principles. "The estoppel doctrine * * * is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." *Standefer*, 447 U.S. at 23 n.18; see Restatement (Second) of Judgments § 29 cmt. f (1982) (Restatement). "Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted." Restatement § 29 cmt. f (explaining rationale for rule that non-mutual collateral estoppel does not apply when the judgment that would be given preclusive effect is inconsistent with another prior judgment). And particularly where the same jury returns inconsistent verdicts in a single proceeding, there can be no doubt that "error * * * most certainly has occurred." *Powell*, 469 U.S. at 65 (internal quotation marks omitted).

In the civil context, that type of error precludes application of the estoppel doctrine. For example, courts may decline to afford preclusive effect to a verdict that "was the result of compromise" rather than a rational application of the jury instructions and the law. Restatement § 28 cmt. j; see, *e.g.*, Howard S. Suskin, *Collateral Estoppel and the Compromise Verdict*, 18 Int'l Soc'y Barristers Q. 354, 354 (1983) ("Although courts will not set aside a jury verdict merely because it is the product of compromise, courts usually conclude that a jury compromise affords a basis for avoiding the collateral estoppel effect of an unimpeached and otherwise valid verdict.") (footnote omitted). So too in the criminal context, collateral estoppel is "predicated on the assumption that the

jury acted rationally and found certain facts in reaching its verdict." *Powell*, 469 U.S. at 68. Because that assumption does not hold when a jury's decision to acquit is inconsistent with its decision to convict, collateral estoppel cannot apply. *Ibid.*

The rule that collateral estoppel is inapplicable when a court lacks confidence in the correctness of the original adjudication carries particular force in the criminal context given the government's inability to appeal from an erroneous acquittal. "It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits," but "post-trial motions and appellate review provide an aggrieved litigant a remedy." *Standefer*, 447 U.S. at 23. And a civil litigant who was deprived of the right to obtain review of the judgment may avoid collateral estoppel on that basis alone. Restatement § 28(1). Although the absence of appellate review of acquittals does not prevent the application of collateral estoppel in a criminal case, it heightens the need to "refuse[] the protection" of the doctrine when its premise "that a criminal jury ha[s] acted in a rational manner" is demonstrably refuted by inconsistent verdicts. *Powell*, 469 U.S. at 66 n.7.

3. Applying these principles here, petitioners cannot carry their burden of demonstrating that the jury in the first trial—which convicted them of violating Section 666—necessarily determined that they did not violate Section 666.

Petitioners contend (Br. 17) that the jury must have found that they "did not commit the predicate [Section 666] offense" when it declined to convict them of conspiring and traveling to violate Section 666. But if the jury necessarily determined that petitioners

were not guilty of a Section 666 offense, it could not rationally have convicted them of that offense. "[T]he jury was offered the same theories of [Section] 666 liability as to every count involving [Section] 666," Pet. App. 24a, yet the same 12 jurors who unanimously voted to convict on a standalone Section 666 crime unanimously voted to acquit on the offenses involving Section 666 as a predicate. As the court of appeals analyzed at length, and as petitioners no longer dispute, see note 6, *supra*, those verdicts are irreconcilably inconsistent. Pet. App. 20a-36a.[8] In light of that inconsistency, "[t]he most that can be said" about the jury's verdicts in this case is that "either in the acquittal[s] or the conviction[s] the jury did not speak their real conclusions, but that does not show that they were not convinced of [petitioners'] guilt." *Powell*, 469 U.S. at 63 (citation omitted).

Petitioners' argument to the contrary "necessarily assumes that the acquittal[s]" on offenses involving Section 666 as a predicate "w[ere] proper—the one[s] the jury 'really meant.'" *Powell*, 469 U.S. at 68. But it is at least "equally possible"—if not far more likely—that the jury "properly reached" the conclusion that petitioners were guilty of a Section 666 violation and acquitted on the related charges "through mistake,

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[8] Because the jury convicted petitioners on the predicate Section 666 crime and declined to convict on the related conspiracy and Travel Act crimes, the court of appeals noted the possibility that the jury might have found that the government failed to prove elements unique to the related crimes. Pet. App. 12a-15a. But the court concluded that the verdicts would nevertheless be inconsistent because, on the facts of the case, "the independent elements of travel and agreement for the conspiracy and Travel Act counts involving [Section] 666 necessarily overlapped with elements of [Section] 666 itself." *Id.* at 14a; see *id.* at 15a n.5.

compromise, or lenity." *Id.* at 65. Petitioners' contention that the jury necessarily found that they were not guilty of violating Section 666 thus rests on "pure speculation," *id.* at 66—which does not suffice to carry their burden of showing that the jury resolved the issue in their favor. The inconsistent verdicts make it impossible to know what the jury actually decided, and "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict"—therefore "are no longer useful." *Id.* at 68.

B. Courts Need Not Disregard Convictions That Have Been Vacated In Determining What The Jury That Returned Those Convictions Necessarily Decided

Petitioners urge the Court to ignore the inconsistent verdicts in their prior trial because the jury's determination that they were guilty beyond a reasonable doubt of violating Section 666 was vacated for instructional error. Although that error applied equally to all offenses involving Section 666 and so does nothing to resolve the inconsistency in the jury's verdicts or restore confidence that the jury acted rationally in acquitting, see Pet. App. 20a-36a, petitioners contend that courts must automatically disregard a conviction that has been vacated when assessing what an acquittal in conflict with that conviction necessarily decided. That argument lacks merit.

1. Petitioners' reliance on Yeager *is misplaced*

Petitioners principally rest their argument on *Yeager*, which they contend (Br. 18) held that "acquittals retain their preclusive effect under *Ashe* even if the jury acted inconsistently in hanging on other counts." But petitioners misread the case. *Yeager* con-

cluded that hung counts cannot be inconsistent with jury verdicts—and so cannot undermine the presumption of jury rationality—because they do not constitute jury decisions at all. 557 U.S. at 121-125. Because hung counts are fundamentally different from vacated convictions in that respect, *Yeager*'s analysis has no application here.

a. In *Yeager*, the defendant faced trial on various charges of fraud and insider trading based on allegations that he had made false and misleading statements about his company and sold stock while in possession of material, non-public information. 557 U.S. at 114. The jury acquitted him of the fraud charges, which the court of appeals there determined must have reflected a finding that he "did not have any insider information that contradicted what was presented to the public." *Id.* at 116 (citation omitted). But the jury was unable to reach a verdict on the insider trading counts, and the government accordingly sought to retry the defendant on those hung counts. Applying *Ashe*, this Court held that, under the collateral estoppel component of the Double Jeopardy Clause, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against [the defendant], a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." *Id.* at 123.

In concluding that collateral estoppel applied, *Yeager* rejected the argument that the jury had acted irrationally by failing to reach a verdict—rather than also acquitting—on the insider trading counts. 557 U.S. at 124-125. Whereas "[a] jury's verdict of acquittal represents the community's collective judgment

regarding all the evidence and arguments presented to it," the Court observed that "there is no way to decipher what a hung count represents." *Id.* at 121-122. The Court accordingly dismissed the notion that "a mistried count can, in context, be evidence of irrationality." *Id.* at 124-125. "[T]he fact that a jury hangs is evidence of nothing," the Court observed, "other than, of course, that it has failed to decide anything." *Id.* at 125. Thus, "[b]ecause a jury speaks only through its verdict," the Court held that "its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 121.

b. i. Petitioners contend (Br. 22) that *Yeager*'s rationale applies equally to convictions that have been vacated because "the jury has not spoken in a way the law recognizes as legitimate and worthy of public respect." That misconstrues *Yeager*'s point.

Yeager emphasized that a jury "speaks only through its verdict" to contrast decisions that can be attributed to the jury as a whole with hung counts, which do not represent the jury's collective view and so shed no light on how all 12 members of the venire evaluated the arguments and evidence in the case. Based on that distinction, *Yeager* concluded that a hung count cannot constitute "evidence of [the jury's] irrationality," 557 U.S. at 125, because, by definition, the jury as a whole has failed to agree on anything. In that situation, a court can conclude that the verdict of acquittal is "the one the jury 'really meant,'" *Powell*, 469 U.S. at 68, because it is the only decision that garnered the jurors' unanimous agreement.

As petitioners point out (Br. 35-36), the government argued in *Yeager* that "a jury that acquits on

some counts while inexplicably hanging on others is not rational." 557 U.S. at 124. But the Court rejected that argument by emphasizing that "courts should scrutinize a jury's decisions, not its failures to decide." *Id.* at 122. A hung count, the Court noted, can be explained by factors such as "exhaustion after a long trial," which would mean not that the jury was irrational, but that it ended deliberations because of fatigue. *Id.* at 121. "To ascribe meaning to a hung count," the Court concluded, "would presume an ability to identify which factor was at play in the jury room," a matter of "guesswork." *Id.* at 121-122. The only collective action in *Yeager*—and thus the only relevant evidence of what the jury as a whole necessarily decided at trial—was the unanimous acquittal. *Yeager* accordingly did not hold, as petitioners assert (Br. 36), that "collateral estoppel applies despite any inconsistency between the hung counts and the acquittals"; rather, it held that a hung count *cannot* be inconsistent with an acquittal because it is not a jury decision at all.

In contrast to a hung count, a jury's decision to convict represents the unanimous judgment of jurors on the merits of the charge. If that decision to convict is irreconcilably inconsistent with the jury's simultaneous decision to acquit on a related count, the conviction is evidence that the jury as a whole has acted irrationally, even if the conviction must subsequently be set aside for unrelated legal error. Here, for example, all 12 jurors voted to convict petitioners of a standalone Section 666 offense, indicating that the entire jury was "convinced that the Government ha[d] proven each of the [elements of the crime] beyond a reasonable doubt." J.A. 71. But those same 12 jurors

turned around and declined to convict petitioners of the related offenses involving Section 666, suggesting that the entire jury was *not* "convinced that the Government ha[d] proven the [elements of a Section 666 offense] beyond a reasonable doubt." J.A. 63, 66. Those jury decisions are indisputably inconsistent. As *Yeager* itself recognized, inconsistent verdicts therefore present "an entirely different context" than a mix of acquittals and hung counts. 557 U.S. at 124; see *ibid.* (observing that hung counts "are not similar to jury verdicts in any relevant sense").

Petitioners accordingly misread *Yeager* in asserting (Br. 35-38) that courts analyzing a collateral estoppel claim must always find that a jury acted rationally, even when the jury's verdicts conclusively demonstrate that it did not. *Yeager* shows that the Court begins with the presumption that the jury was rational, just as the Court ordinarily presumes that a jury has followed its instructions. See, *e.g.*, *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2051 (2012). But when all 12 jurors vote to return irreconcilably inconsistent verdicts, "'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred." *Powell*, 469 U.S. at 65. The "assumption that the jury acted rationally and found certain facts in reaching its verdict" of acquittal is therefore overcome. *Id.* at 68.

Petitioners are also wrong to contend (Br. 21) that "*Yeager* necessarily presumed that the 'jury verdicts' from which hung counts fundamentally differed were valid and final jury verdicts." The finality of a conviction has no inherent connection to the question whether that conviction provides "evidence of irrationality." *Yeager*, 557 U.S. at 125. In some cases, of course, the

existence and nature of a legal error may resolve an apparent inconsistency in the jury's verdicts. If, for example, the judge "order[s] [the jury] to return a guilty verdict" on one count but not on another, Pets. Br. 23, that error may explain the discrepancy in the verdicts. Or if a jury receives an erroneous instruction on the count of conviction but the correct instruction on the charge on which it acquits, the instructional error may reconcile the verdicts. But as this case illustrates, inconsistent verdicts may be entirely disconnected from any legal error in the proceeding and so not explainable on that ground. Here, the jury received the same flawed jury instructions on all counts involving Section 666, so that instructional error does not explain the inconsistent verdicts or establish what petitioners must show—that the acquittals represent the jury's "real conclusions." *Powell*, 469 U.S. at 64 (citation omitted).

ii. Petitioners repeat their error by relying (Br. 28-30) on *Yeager*'s observation that "there is no way to decipher what a hung count represents." 557 U.S. at 121. *Yeager* focused on whether a court could "ascribe meaning to a hung count" to determine whether it could, "in context, be evidence of irrationality." *Id.* at 121, 125. Because "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything," the Court held that hung counts are too inconclusive to create a true inconsistency with "a unanimous verdict that the jurors did return." *Id.* at 122, 125. But as just noted, convictions *are* evidence of something because they represent the collective decision of the jury as a whole. Because convictions signal the unanimous vote of all 12 jurors to find guilt beyond a reasonable doubt, no "guess-

work" or "conjecture" is required to decipher their meaning. *Id.* at 122. Thus, in contrast to hung counts, convictions can be "logically inconsistent" with accompanying acquittals "on their face." *Id.* at 125.

Petitioners raise a red herring (Br. 28-29) by observing that the instructional error in this case makes it impossible to determine whether the jury believed petitioners were guilty of an exchange or a gratuity when the jury convicted them of violating Section 666. That is beside the point because it does nothing to eliminate the inconsistency in the jury's verdicts. The erroneous instructions applied to all of the Section 666-based offenses, and a rational jury therefore could not have reached conflicting conclusions on petitioners' guilt of those offenses. The convictions accordingly reveal the jury's inconsistency—which is the relevant issue here—even if they do not reveal which theory of liability jurors relied upon in reaching those inconsistent verdicts.

Petitioners' example proves the point. Petitioners speculate (Br. 30)—with no basis in the record—that "all 12 jurors might have thought petitioners guilty of a gratuity, while none thought them guilty of an exchange." But if that is what all 12 jurors thought, then the jury should have convicted petitioners of conspiring and traveling in interstate commerce to violate Section 666, because they were told that a gratuity theory sufficed for liability on those offenses as well. The instructional error does not make sense of the jury's failure to convict, nor does it provide any clue about what motivated the jury to reach inconsistent determinations. Petitioners accordingly cannot rely on the instructional error as a basis to ignore the

inconsistency when determining which facts the jury necessarily found in reaching its verdicts.

Petitioners' argument ultimately reduces to a claim that collateral estoppel applies because the government cannot show that the jury necessarily resolved the bribery issue *against* them when it unanimously voted to convict. But that turns the *Ashe* inquiry on its head. It is petitioners who bear the burden of unequivocally showing that the jury necessarily decided the bribery issue *in their favor*. Because the jury returned inconsistent verdicts, they cannot meet that burden here.

iii. Petitioners further misread *Yeager* by contending (Br. 24-28) that it adopted a rule that events occurring at trial that do not terminate jeopardy must be disregarded when conducting *Ashe*'s collateral estoppel inquiry. As petitioners observe (Br. 26), "[i]t has long been settled * * * that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988) (citing *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896)). The Court has treated a second trial as a continuation of the original jeopardy, recognizing that the defendant "has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Burks* v. *United States*, 437 U.S. 1, 15 (1978). Petitioners assert (Br. 24) that, because a vacated conviction is "a nonevent for th[e] * * * double jeopardy purpose[]"

of terminating jeopardy, it is "equally irrelevant to the *Ashe* analysis."

That argument conflates two distinct components of the Double Jeopardy Clause, which focus on different issues, serve different purposes, and arise under different portions of the Clause's text. The continuing jeopardy principle implicates the defendant's "interest in avoiding multiple trials" and requires a determination of whether he has been "put in jeopardy 'twice.'" *Yeager*, 557 U.S. at 118-119. The collateral estoppel principle serves a separate "interest in preserving the finality of the jury's judgment" and trains on the distinct question whether "it is appropriate to treat" two crimes as "the 'same offence'" within the meaning of the Clause. *Ibid.* Petitioners' effort to blur together those separate double jeopardy doctrines has no grounding in the Clause's text or function.

Nor does petitioners' argument make sense as a matter of logic. Any number of events may occur at trial that fail to terminate jeopardy yet help illuminate the basis of a jury's verdict for purposes of applying collateral estoppel. Jeopardy does not terminate the moment an indictment issues, but the charging document can help to determine what a jury has necessarily decided. *Ashe*, 397 U.S. at 444. Jeopardy does not terminate when the trial court instructs the jury, but those instructions can clarify the basis for the jury's decision. *Schiro*, 510 U.S. at 234-235. Jeopardy does not terminate when witnesses testify, but that evidence may reveal what issues were in dispute and thus necessarily resolved by the jury. *Ashe*, 397 U.S. at 444. Jeopardy likewise does not terminate when a conviction is vacated for legal error on appeal, but the vacated conviction may nevertheless be relevant when

considering what the jury that unanimously voted to return that conviction necessarily decided.

It does not matter that, for purposes of continuing jeopardy, a vacated conviction has been "wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969). That "conceptual abstraction[]" explains why a retrial does not transgress the double jeopardy "protect[ion] against a second prosecution for the same offense after conviction." *Id.* at 717, 721 n.18. But the Court's recognition that a vacated conviction is nullified for purposes of permitting retrial neither changes the historical fact that the jury in the first trial returned that verdict nor alters what that jury necessarily decided.

Yeager cannot reasonably be read to support petitioners' argument. As petitioners note (Br. 24-25), *Yeager* referred to a hung count as a "nonevent" both in describing why retrial generally is permitted when the jury fails to reach a verdict and in concluding that hung counts are not relevant to a collateral estoppel analysis because they do not constitute jury decisions. 557 U.S. at 118, 120. But while *Yeager* observed that a mistrial is not "an event of significance" in either of those distinct double jeopardy contexts, *id.* at 124, it did not draw a causal link between them. For purposes of the *Ashe* inquiry, *Yeager* made clear, a hung count is a "nonevent" not because it fails to terminate jeopardy but because "a jury speaks only through its verdict" and "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything." *Id.* at 121, 125. For the reasons described above, a conviction that reflects the jurors' unanimous agreement and collective judgment on the merits of the charge cannot be characterized as a

"nonevent" in the way *Yeager* deemed relevant, even if that verdict must be set aside on appeal for legal error.

Petitioners are also wrong to rely (Br. 25) on *Yeager*'s rejection of the government's separate argument in that case that collateral estoppel does not apply when a defendant remains in continuing jeopardy because a retrial does not qualify as a successive prosecution. *Yeager* clarified that collateral estoppel and continuing jeopardy are distinct doctrines. 557 U.S. at 117-119. Because collateral estoppel is an independent component of the Double Jeopardy Clause, it can preclude relitigation of issues that were necessarily decided in a prior proceeding, even if the defendant's original jeopardy did not terminate. *Id.* at 118-119. By treating continuing jeopardy and collateral estoppel as intrinsically linked, petitioners press the very line of reasoning that *Yeager* rejected.

2. Principles of finality and respect for the jury's verdict do not require courts to disregard a jury's inconsistency when applying collateral estoppel

Petitioners contend (Br. 35) that courts should ignore a jury's inconsistent verdicts when determining what that jury necessarily decided to show "respect for the finality" of the acquittal. Although they rest that argument on *Powell*, the Court's analysis in *Powell* squarely forecloses their claim.

a. To recap, *Powell* reaffirmed a long line of cases holding that a criminal defendant may not obtain reversal of a conviction on grounds that it is inconsistent with a verdict of acquittal returned by the same jury. 469 U.S. at 62-63; see *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981) (per curiam); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn*, 284 U.S. at 393. In that situation, the Court reasoned, the basis

of the jury's inconsistent determinations is unknowable. The Court further deemed it "imprudent and unworkable" to interpret the inconsistent verdicts case by case, noting that "[c]ourts have always resisted inquiring into a jury's thought processes." *Powell*, 469 U.S. at 66-67. "[T]hrough this deference," the Court reasoned, "the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.* at 67. Thus, while the defendant in *Powell* "wa[s] given the benefit of her acquittal on the counts on which she was acquitted," the Court observed that "it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted." *Id.* at 69.

In reaching that conclusion, the Court specifically rejected the defendant's argument that the conviction should be set aside based on principles of collateral estoppel. *Powell*, 469 U.S. at 68-69. That argument, the Court explained, "simply misunderstands the nature of the inconsistent verdict problem." *Id.* at 68. The defendant wanted the Court to look at the acquittal in isolation and assume that it necessarily resolved facts in her favor. She could not make that showing, however, in light of the inconsistent conviction, which indicated that the jury had resolved facts against her. "The problem is that the same jury reached inconsistent results," the Court concluded, and "once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Ibid.*

b. Petitioners are wrong to assert (Br. 32) that *Powell* "commands the conclusion" that an acquittal

that is inconsistent with a conviction must nevertheless be given preclusive effect to avoid "[i]mpugn[ing]" the jury's judgment.

i. Petitioners' reading of *Powell* contradicts this Court's whole point that it is impossible to say that the acquittal resolved facts in the defendant's favor when the jury returns inconsistent verdicts. There can be no ambiguity about *Powell*'s rationale; the Court made the point again and again. Thus, the Court observed that "inconsistent verdicts * * * should not necessarily be interpreted as a windfall to the Government at the defendant's expense" because it is "equally possible" that "the inconsistent verdicts may favor the criminal defendant." 469 U.S. at 65. Or in other words: "[I]t is unclear whose ox has been gored." *Ibid.* Or in still other words: It "is not necessarily correct" that "the acquittal * * * [i]s proper—the one the jury 'really meant'" because "all we know is that the verdicts are inconsistent." *Id.* at 68. And again: "The most that can be said . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* at 64-65 (quoting *Dunn*, 284 U.S. at 393).

Nothing about *Powell*'s rationale changes when the inconsistent conviction is vacated for legal error (putting aside those errors that themselves explain the inconsistency, see pp. 29-30, *supra*). An unrelated legal error does not clarify which facts the jury found in reaching inconsistent verdicts. Nor does the error erase the historical fact that the jury as a collective unit acted irrationally. For purposes of applying collateral estoppel, therefore, the error does not alleviate—

and should not excuse—the defendant's inability to carry his burden of showing that the jury necessarily decided facts in his favor.

Petitioners emphasize (Br. 32-33) *Yeager*'s observation that *Powell* "declined to use a clearly inconsistent verdict to second-guess the soundness of another verdict" and instead concluded that "respect for the jury's verdicts counseled giving each verdict full effect, however inconsistent." *Yeager*, 557 U.S. at 124-125. But those descriptions merely reflect *Powell*'s holding that a defendant may not rely on the jury's inconsistency to obtain reversal of her otherwise-valid conviction. *Yeager* did not purport to overrule the rationale underlying that holding—namely, that courts should not infer from the acquittal that the jury necessarily found the defendant not guilty in light of the jury's irreconcilably inconsistent finding of guilt beyond a reasonable doubt.

ii. Petitioners likewise fail to establish (Br. 31) that *Powell*'s rationale is inapplicable in "the context of a re-prosecution." If inconsistent jury verdicts make it impossible to know that the jury necessarily decided facts in the defendant's favor at the conclusion of the first trial, as *Powell* held, then it is equally impossible to know that the jury necessarily decided facts in the defendant's favor for purposes of applying collateral estoppel in a second trial. In that situation, as this Court has previously recognized, the "inconsistency is reason, in itself, for not giving preclusive effect to the acquittals." *Standefer*, 447 U.S. at 23 n.17.

Indeed, *Powell* contemplated that the acquittals in that case would not have preclusive effect to foreclose retrial on the counts of conviction if the convictions were set aside. The court of appeals in *Powell* had

reversed the convictions based on the inconsistency, thereby preventing re-prosecution on those counts. See *United States* v. *Powell*, 708 F.2d 455, 457 (9th Cir. 1983), rev'd, 469 U.S. 57 (1984). In this Court, the government argued that the "outright reversal" was improper because, even if the convictions were invalidated, "the inconsistency in the verdict" meant that "the basis of the jury's acquittal cannot satisfactorily be determined" and "the doctrine of collateral estoppel [would] not preclude a new trial." U.S. Br. at 30 n.37, *Powell*, *supra* (No. 83-1307). Although *Powell* ultimately held that the inconsistent convictions need not be overturned, the Court appeared to agree that a contrary ruling would mean that "the defendant [would] receive a new trial on the conviction[s]"—rather than reversal—"as a matter of course." 469 U.S. at 65.

iii. Nor can petitioners escape *Powell*'s rationale by observing (Br. 34) that "[a]n acquittal is the most sacrosanct verdict of all under the Double Jeopardy Clause." There is no dispute that a verdict of acquittal is final and unassailable. An acquittal accordingly cannot be invalidated even if it is inconsistent with a conviction and therefore "likely to be the result of mistake, or lenity." *Powell*, 469 U.S. at 68; see, *e.g.*, *Evans* v. *Michigan*, 133 S. Ct. 1069, 1074 (2013) (observing that an acquittal stands even if it is "based upon an egregiously erroneous foundation") (citation omitted). In that manner, the verdict of acquittal is given "full effect." *Yeager*, 557 U.S. at 124.

But as *Powell* recognized, an acquittal's special status does not make it any easier to determine what a jury has necessarily decided when the jury issues inconsistent verdicts. See 469 U.S. at 65-66. And petitioners' observation (Br. 1) that an acquittal is a "sac-

rosanct, final judgment, immune from any subsequent impeachment" in fact "strongly militates against giving an acquittal preclusive effect" because the government lacks an "avenue to correct errors" in that judgment. *Standefer*, 447 U.S. at 23. The government's inability to appeal an erroneous acquittal makes it all the more important to hold petitioners to their burden of demonstrating that the prerequisites for applying collateral estoppel are satisfied. *Powell*, 469 U.S. at 65.

iv. In all events, petitioners' invocation of respect for the jury's verdict rings hollow given that they ask this Court to ignore the jury's unanimous decision that they were guilty of violating Section 666 and instead conclude from an inconsistent part of the verdict that the jury necessarily found that they were *not* guilty of violating Section 666.

As petitioners point out, their Section 666 convictions had to be vacated for instructional error, so the jury did not necessarily find them guilty of an exchange theory of bribery. But the jury instructions included the exchange theory, J.A. 70-77, and the government presented sufficient evidence to support conviction on a proper quid pro quo theory, Pet. App. 90a. Accordingly, all 12 jurors may well have found that petitioners committed bribery in violation of Section 666 under a valid theory when they unanimously voted to convict.[9] Principles of respect for and deference to

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[9] Notably, the jury separately convicted Bravo-Fernandez of traveling in interstate commerce with the intent to commit bribery in violation of Puerto Rico law, J.A. 88, and the jury instructions on that count (in contrast to the instructions concerning Section 666) made clear that the bribery offense required a quid pro quo exchange, J.A. 69, 77. The conviction involving Puerto Rico bribery thus cuts against petitioners' speculation (Br. 29) that "all 12

the jury do not warrant transforming that conviction into an acquittal that the jury itself declined to return.

3. Vacated convictions are a relevant part of the trial record when determining what a jury necessarily decided

Petitioners further urge the Court to disregard the jury's inconsistent verdicts by adopting a "categorical rule" that a "vacated conviction may not be used to the defendant's detriment." Pets. Br. 40 (citation and brackets omitted). Petitioners assert (Br. 39) that, "[t]o [their] knowledge, this Court has never held that a vacated conviction can be used against a defendant for any purpose." But, in fact, this Court and lower courts have recognized in a variety of contexts that vacated convictions may illuminate what the jury necessarily decided or provide other relevant evidence admissible in a subsequent prosecution.

a. i. Petitioners' suggestion that unconstitutional convictions may not be relied upon for any purpose contravenes this Court's decision in *Morris* v. *Mathews*, 475 U.S. 237 (1986). In *Morris*, a defendant who had been convicted of aggravated robbery was subsequently tried and convicted of aggravated murder based on the same incident. *Id.* at 240-241. As the case came to this Court, it was clear that the successive prosecution for aggravated murder, which required proof of ag-

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jurors might have agreed that petitioners were not guilty of an 'exchange'" had they been properly instructed on the Section 666 counts. Although the district court subsequently reversed the conviction because the relevant Puerto Rico bribery statute was repealed shortly before the travel took place, Pet. App. 64a, that unrelated error does not undermine the inference that the jurors found guilt beyond a reasonable doubt on an exchange theory of bribery.

gravated robbery, violated the Double Jeopardy Clause. *Id.* at 244. The resulting conviction therefore was unconstitutional and could not stand. *Ibid.* But it was also clear that a prosecution for the lesser-included offense of simple murder would not violate double jeopardy. *Ibid.* The State accordingly sought to reduce the jeopardy-barred aggravated murder conviction to a conviction for murder. *Id.* at 245. The defendant, in contrast, argued that he was entitled to a new trial, reasoning that "because the trial for aggravated murder should never have occurred, the Double Jeopardy Clause bar[red] the State from taking advantage of the jeopardy-barred conviction by converting it into a conviction for the lesser crime of murder." *Ibid.*

In analyzing the parties' arguments, this Court observed that it was "clear that the jury necessarily found that the defendant's conduct satisfie[d] the elements of the lesser included offense" of murder when it convicted him of aggravated murder. *Morris*, 475 U.S. at 247. Thus, although that conviction was unconstitutional, the Court relied on it to determine what the jury had necessarily decided. And reliance on the invalid conviction worked to the defendant's detriment, because the Court concluded that it was appropriate to enter a conviction on the lesser-included offense of murder that the jury had necessarily found rather than grant the defendant a new trial, unless he could demonstrate that "but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." *Ibid.*

Lower courts, too, have recognized that convictions that have been vacated may provide relevant information about what the jury necessarily decided. In

United States v. *Christensen*, No. 08-50531, 2015 WL 11120665 (9th Cir. July 8, 2016), for example, the court vacated the defendant's convictions for violating the Computer Fraud and Abuse Act of 1986 (CFAA), 18 U.S.C. 1030, based on instructional error. 2015 WL 11120665 at *13. The court then considered whether to vacate the defendant's convictions for identity theft, which required the jury to find criminal intent under either the CFAA or a parallel state-law statute. *Id.* at *15. To resolve that question, the court considered what the vacated CFAA convictions revealed about the jury's factfinding. *Id.* at *17. "Even though those convictions must be set aside," the court observed, "the facts that the jury necessarily found in returning those guilty verdicts clearly evince intent under" the state statute. *Ibid.* Thus, because the vacated convictions demonstrated that the jury necessarily found facts that would establish a violation of the state statute, the court affirmed the identity theft convictions. See *ibid.*; see also, *e.g.*, *Brennan* v. *United States*, 867 F.2d 111, 115-116 (2d Cir.) (relying on vacated wire fraud convictions to conclude that the jury had necessarily decided that certain telephone calls had occurred in the conduct of an enterprise for purposes of upholding the defendant's conviction for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*), cert. denied, 490 U.S. 1022 (1989).

The Third Circuit relied on a vacated conviction for a similar purpose in *United States* v. *Velasquez*, 885 F.2d 1076 (1989), cert. denied, 494 U.S. 1017 (1990)—and in that case it benefitted the defendant. The defendant in *Velasquez* was convicted of conspiracy, which could have been based on a jury finding that she conspired with a co-defendant or with other unnamed

individuals. *Id.* at 1091. If the jury had convicted her of conspiring with the co-defendant, the conviction would need to be reversed because there was insufficient evidence that the co-defendant had joined the conspiracy. *Id.* at 1090-1091. But if the jury found that she had conspired with other unnamed individuals, the conviction could stand. *Id.* at 1091. To help clarify the basis of the conviction, the court noted that the same jury had also convicted the co-defendant of conspiracy. *Ibid.* Although that conviction had been vacated for insufficient evidence, the court considered it a relevant part of the record because it showed "a substantial likelihood that the jury's verdict finding [the defendant] guilty of conspiracy was based on an impermissible determination that she conspired with the [co-defendant]." *Ibid.* Thus, the court relied on the co-defendant's vacated conviction to help illuminate the basis of a separate verdict returned by the same jury.

ii. Courts have also recognized that vacated convictions can have "relevan[ce]" in subsequent proceedings in the sense that they have the "tendency" to make a material fact "more or less probable than it would be without" the convictions. Fed. R. Evid. 401.[10] For example, this Court has held that the existence of a vacated conviction may defeat an action for malicious prosecution because the conviction, although it has been set aside, provides evidence that there was probable cause for the prosecution. See *Crescent City Live*

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[10] This illustrates another difference between hung counts and vacated convictions. See *Yeager*, 557 U.S. at 121 (observing that "[e]ven in the usual sense of 'relevance,' a hung count hardly 'make[s] the existence of any fact more probable or less probable'") (second set of brackets in original) (quoting Fed. R. Evid. 401).

Stock Co. v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 160 (1887) (faulting the lower court for "failing to give due effect" to a vacated conviction as evidence that probable cause existed); see also, *e.g.*, *Harris* v. *Bornhorst*, 513 F.3d 503, 520 (6th Cir.) (summarizing Ohio rule that "a finding of guilty of a criminal offense by a court having jurisdiction to try and dispose of the case, *even though later and finally reversed by a reviewing court*, raises a conclusive presumption of probable cause and constitutes a complete defense in a later action for malicious prosecution brought by the defendant in the criminal case against the instigator thereof") (citation omitted), cert. denied, 554 U.S. 903 (2008); *Mosley* v. *Wilson*, 102 F.3d 85, 91 (3d Cir. 1996) (observing that courts may rely on a conviction that was overturned to find probable cause on the "rationale * * * that a guilty verdict establishes 'that the person who initiated the proceedings had reasonable grounds for so doing'") (quoting Restatement (Second) of Torts § 667(1) cmt. b (1977)).

In addition, courts have concluded that vacated convictions may be relevant, admissible evidence in a subsequent proceeding to prove facts such as a defendant's motive, intent, or plan, or to establish the conviction's effect on the victim's state of mind. For example, the Ninth Circuit concluded that a defendant's prior rape conviction, which had been reversed for instructional error, was properly admitted in a later rape prosecution to show the defendant's intent and plan, where the two crimes were committed in a similar manner. *United States* v. *Sneezer*, 983 F.2d 920, 924 (1992) (per curiam), cert. denied, 510 U.S. 836 (1993). Similarly, the Fifth Circuit rejected a defendant's challenge to the admission of a vacated robbery

conviction at his murder trial, reasoning that the vacated conviction was admitted "only for the purpose of showing motive" to kill the victim, who was a witness against the defendant in the robbery prosecution. *Russell* v. *Lynaugh*, 892 F.2d 1205, 1212 (1989), cert. denied, 501 U.S. 1259 (1991). And the Eleventh Circuit approved the admission of a vacated murder conviction in a subsequent prosecution of the defendant for violating the Hobbs Act, 18 U.S.C. 1951, because the vacated conviction "was relevant to the victim's state of mind" by showing that he reasonably feared the defendant. *United States* v. *Blanton*, 793 F.2d 1553, 1564-1565, cert. denied, 479 U.S. 1021 (1986). Other examples abound. See, *e.g.*, *United States* v. *Wagner*, 989 F.2d 69, 73-74 (2d Cir. 1993) (relying on vacated drug conviction to find probable cause for a wiretap, and observing that the reversal of the conviction "on technical grounds does not affect its probity as to probable cause"); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 738 F.2d 1404, 1407 n.4 (4th Cir. 1984) (relying on strikers' convictions for strike misconduct even though "[m]any of the convictions were subsequently overturned" because the vacated convictions were "probative of [the employer's] 'honest belief' that [the strikers] had committed acts which justified suspension or discharge").

A vacated conviction that is inconsistent with an acquittal is similarly relevant to a collateral estoppel inquiry because it makes the existence of a material fact—that the jury necessarily decided issues in the defendant's favor—"less probable." Fed. R. Evid. 401. The "government's theory" is not, as petitioners assert (Br. 43), "that the vacated convictions embody a factual finding of guilt." Rather, the theory is that pe-

titioners cannot meet *their* burden of establishing that the acquittals necessarily embody a factual finding of innocence because, as a matter of historical fact, the jury returned inconsistent verdicts.[11] In deeming vacated convictions a relevant part of the record for that limited purpose, the court of appeals acted well within precedent.

b. More fundamentally, petitioners' suggestion that courts must automatically ignore vacated convictions when assessing what a jury necessarily decided contradicts *Ashe*. As the Court emphasized in that case, "the rule of collateral estoppel in criminal cases" must be applied "with realism and rationality," taking into account "all the circumstances of the proceedings." 397 U.S. at 444 (citation omitted). Errors that occur at trial are themselves a relevant circumstance of the proceeding that may help to establish what the jury necessarily decided. For example, if a jury is improperly instructed on the elements of a crime, those erroneous instructions may establish that a particular issue was not even submitted to the jury for resolution—

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[11] Petitioners' cases (Br. 38-43) holding that courts may not rely on vacated convictions as evidence of the defendant's guilt for purposes of imposing collateral consequences are therefore inapposite. The vacated convictions here are relevant not to establish guilt, but to establish the jury's inconsistency. It is therefore wholly beside the point that "vacated convictions have no collateral estoppel effect." Pets. Br. 40. The government is not seeking to rely on the jury's convictions on the Section 666 counts to collaterally estop petitioners from proving a fact in future litigation. Rather, petitioners are attempting to rely on the acquittals to collaterally estop retrial for a Section 666 offense. The Section 666 convictions are relevant not because they should be given preclusive effect, but because they show the acquittals should *not* be accorded that effect in light of the jury's inconsistent verdict.

let alone necessarily decided by the jury's verdict.[12] A court conducting the "practical" inquiry commanded by *Ashe*, *ibid.* (citation omitted), similarly need not disregard a conviction that demonstrates that the jury returned inconsistent verdicts, even if the conviction is set aside for unrelated legal error. After all, *Ashe* underscored that collateral estoppel applies to facts found by "a rational jury," *ibid.*—and focusing on what a rational jury has done makes sense only if the jury has, in fact, acted rationally.

Ashe further emphasized that courts must evaluate the record of the prior proceedings with "realism" and not strain to hypothesize conceivable bases for the jury's decision that lack footing in the on-the-ground facts of the proceeding. 397 U.S. at 444. Thus, courts should not conclude that "the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest" so as to deny preclusive effect to an acquittal on the theory that it did not necessarily resolve the sole issue in dispute. *Id.* at 444 n.9 (citation omitted). But that practical inquiry works both ways. It would be equally improper here to look at the acquittals in isolation and pretend that the jury necessarily found that petitioners were not guilty of violating Section 666 when the same jury simultaneously returned a conviction finding them guilty of that very offense.

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[12] Imagine, for example, that the trial court in this case had erroneously instructed the jury only on a gratuity theory, without mentioning an exchange theory at all. Under *Ashe*, those erroneous instructions would surely be relevant to show that the jury did not necessarily determine that petitioners did not engage in a quid pro quo exchange.

C. Petitioners' Policy Arguments Do Not Justify Ignoring The Inconsistency In A Jury's Verdicts When Conducting A Collateral Estoppel Inquiry

Petitioners contend (Br. 50) that courts should ignore a jury's inconsistent verdicts when determining whether collateral estoppel applies in order to deter prosecutors from "overcharg[ing] cases and * * * push[ing] far-reaching interpretations of criminal statutes." Those policy arguments lack merit and provide no basis for applying collateral estoppel when its essential predicate—the ability to say what a jury necessarily determined in its acquittal—is missing.

1. At the outset, petitioners cite no persuasive evidence that prosecutors routinely overcharge cases or urge unwarranted interpretations of criminal offenses in hopes of obtaining inconsistent verdicts so that they can avoid the application of collateral estoppel in a subsequent prosecution. Indeed, it is fanciful to suggest that prosecutors craft their indictments and statutory arguments in anticipation of a possible *retrial* in a case. A prosecutor who pursues unnecessary and duplicative charges or who urges an indefensible interpretation of a statute risks confusing jurors and increasing the likelihood that they will use their unreviewable ability to acquit out of lenity "as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Powell*, 469 U.S. at 65; see *Standefer*, 447 U.S. at 22. And a prosecutor who gambles on obtaining a retrial faces the risk that "[t]he passage of time may make it difficult or impossible for the Government to carry [its] burden" of proving guilt beyond a reasonable doubt. *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986); see, *e.g.*, *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982) ("Passage of time,

erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible."). Prosecutors are not likely to take those risks and strategically overreach simply to try to obtain an inconsistent verdict and thereby avoid collateral estoppel in any retrial.[13]

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[13] Petitioners contend (Br. 47) that "[i]t is not hard to find recent and extreme examples of blatant overcharging," but the cases they cite (Br. 47-48) do not prove the point. In *United States* v. *Flanders*, 752 F.3d 1317 (11th Cir. 2014), cert. denied, 135 S. Ct. 1188 (2015), for example, the defendants fraudulently lured young women to Florida for a supposed acting audition, drugged the victims, engaged in sex acts with them while they were in a semi-conscious and unconscious state, and then sold pornographic videos of those assaults online. *Id.* at 1326. Petitioners express indignation that the defendants were convicted of "sex trafficking by fraud"—that is, fraudulently enticing the women to come to Florida where they were drugged and assaulted—and "benefitting by participating in a venture that commits sex trafficking by fraud"—that is, selling videos of the assaults. Pets. Br. 47-48 (citation omitted). But those convictions clearly penalize different aspects of the defendants' conduct and cannot fairly be characterized as overcharging. The same is true of petitioners' other examples. See *United States* v. *Anderson*, 783 F.3d 727, 738 (8th Cir.) (finding no "redundancy" in convictions for conspiracy to commit arson—which "is aimed at punishing persons acting in concert to commit an offense"—and using fire in the commission of the conspiracy offense—which "focuses on punishing those who make criminal use of fire") (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 199, 136 S. Ct. 200, and 136 S. Ct. 347 (2015); *United States* v. *Garcia*, 754 F.3d 460, 475 (7th Cir.) (observing that Congress clearly intended to "provide for multiple punishments for the same act" when it enacted 18 U.S.C. 924(c), which prohibits the use of a firearm in relation to a crime of violence, and that assault with a dangerous weapon in furtherance of a racketeering enterprise is "just the sort of 'crime of violence' that Congress wanted to include within [Section] 924(c)'s ambit"), cert. denied, 135 S. Ct. 395 and 135 S. Ct. 467 (2014), 135 S. Ct. 988 and 135 S. Ct. 991 (2015). In any event, there is no evidence that

In that respect, this case bears no resemblance to the prosecution in *Ashe* that prompted this Court to hold that the Double Jeopardy Clause incorporates the principle of collateral estoppel. In *Ashe*, the State sequentially prosecuted the defendant for robbing multiple victims in a single criminal incident, going to trial first on only one count involving one victim and then, when that trial ended in an acquittal, pressing forward with a second trial for robbing another victim. 397 U.S. at 437-439. In the process, the State deliberately honed its trial strategy to shore up its case in light of the acquittal, "treat[ing] the first trial as no more than a dry run for the second prosecution." *Id.* at 447. This Court recognized that collateral estoppel should apply to curb that kind of "unfair and abusive reprosecution[]." *Id.* at 445 n.10. Here, in contrast, the government brought all its charges in a single prosecution, with no indication that prosecutors strategically sought "multiple bites at the apple." Pets. Br. 51.[14] Petitioners' policy arguments do not warrant

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prosecutors in those cases pursued multiple charges in an effort to avoid collateral estoppel if the jury returned inconsistent verdicts, nor any evidence that the prosecutors even considered that possibility.

[14] Petitioners are wrong to assert (Br. 50-51) that their prosecution is an example of overcharging and unreasonable statutory interpretation. Contrary to their characterization, there is nothing unusual or pernicious about charging a defendant with both conspiracy and the substantive offense. And as the court of appeals recognized, "most circuits to have addressed th[e] issue" have concluded that Section 666 criminalizes gratuities, demonstrating that the proper interpretation of the statute is subject to reasonable debate. Pet. App. 60a; see *id.* at 96a-97a (citing cases from the Second, Seventh, and Eighth Circuits holding that Section 666 covers gratuities because it "prohibits one from corruptly offering a thing of value with intent to 'influence *or reward*' an agent, and

distorting the doctrine of collateral estoppel by ignoring inconsistent verdicts that demonstrate that it should not apply.

2. Petitioners' policy arguments further ignore the weighty interests in permitting retrial when a defendant succeeds in having his conviction set aside for legal error.

"[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks*, 437 U.S. at 15. The Court has recognized that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Ibid.* (quoting *United States* v. *Tateo*, 377 U.S. 463, 466 (1964)). Indeed, it is "at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *Tateo*, 377 U.S. at 466. The rule that retrial is permitted after a conviction is vacated for legal error thus has important "implications * * * for the sound administration of justice." *Ibid.*

Petitioners accordingly start from the wrong baseline in asserting (Br. 2) that "[t]he government should never benefit from having obtained an unlawful conviction" and that retrial would be "antithetical to a fair system of criminal justice." Vacatur of petitioners' convictions for instructional error does not "immuni[ze]

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prohibits an agent from corruptly soliciting or demanding a thing of value with intent to be 'influenced *or rewarded*'").

[them] from punishment," *Burks*, 437 U.S. at 15 (citation omitted), but rather entitles them only to be tried on a narrower theory. A retrial following vacatur based on instructional error is therefore the default rule—part of the "one full and fair opportunity" prosecutors should have to obtain a conviction of those who have violated the law. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). There is no injustice in applying that rule here, where the evidence at trial supported conviction on a valid bribery theory, the jury returned a conviction for bribery, and petitioners have not carried their burden of showing that the acquittals necessarily reflect a factual determination that they were not guilty of bribery.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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